STATE OF MICHIGAN

IN THE SUPREME COURT

* * * * * * * * * * *

Appeal from the Court of Appeals
The Honorable Kirsten F. Kelly, the Honorable Kathleen Jansen
and the Honorable Pat M. Donofrio

* * * * * * * * * * *

RALPH ORMSBY and KIMBERLY ORMSBY,
Plaintiffs-Appellees,

vs.

Supreme Court Nos. 123287
123289

Court of Appeals No. 233563

CAPITAL WELDING, INC.,
Defendant-Appellant/Appellee,

Oakland Circuit Court No.
98-008608-NO

and

MONARCH BUILDING SERVICES, INC.,
Defendant-Appellee/Appellant,
et al,
_____/

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BRIEF ON APPEAL
OF DEFENDANT-APPELLANT MONARCH BUILDING SERVICES, INC.

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STATEMENT OF QUESTIONS PRESENTED

ISSUE I

IS THE "COMMON WORK AREA" DOCTRINE A DOCTRINE THAT HAS APPLICATION ONLY AS TO GENERAL CONTRACTORS, IN THE INSTANCES WHERE IT APPLIES?

Defendant-Appellant answers this question ***"YES"***.

Plaintiff-Appellee would answer this question ***"NO"***.

The Circuit Court did not address this question.

The Court of Appeals answered this question ***"NO"***.

ISSUE II

IS THE RETAINED CONTROL DOCTRINE A SEPARATE AND DISTINCT DOCTRINE FROM THE COMMON WORK AREA DOCTRINE?

Defendant-Appellant answers this question ***"YES"***.

Plaintiff-Appellee would answer this question ***"NO"***.

The Court of Appeals answered this question ***"YES"***.

STATEMENT OF FACTS

A. Relevant Parties Involved in Litigation.

1.	Ralph Ormsby:	Plaintiff-Appellee. Employed as an iron worker through Iron Workers Local 25 for a number of years. He was working for his employer Abray Steel Erectors at the time of the accident. On the date of the accident was working as a foreman on the job, and was the highest ranking Abray official on the job site.
2.	Kimberly Ormsby:	Plaintiff-Appellee. Spouse of the injured Plaintiff. She is maintaining a claim for loss of consortium.
3.	Rite-Aid of Michigan:	One-time Defendant. Dismissed per Stipulation and Order on January 26, 2001. Owner of the project and the entity that contracted with Monarch Building Services for the construction of a Rite-Aid store located at the corner of Crooks and Maple in the City of Troy.
4.	Monarch Building Services, Inc.:	Defendant-Appellant. Entity that contracted with Rite-Aid to act as the general contractor for the construction of the Rite-Aid store, and proceeded to subcontract all the structural steel and deck work, including fabrication and erection to Capital Welding.
5.	Capital Welding, Inc.:	Defendant-Appellant. Entity that contracted with Monarch Building Services to provide all structural steel and deck fabrication and erection, and subcontracted the erection work per a purchase order to Abray Steel Erectors.
6.	Abray Steel Erectors:	Non-party. Steel erection contractor owned by Donald Abray, hired by Capital Welding, and served as the employer of Plaintiff Ralph Ormsby.

B. Factual Events Pertaining to the Ormsby Accident.

On or about February 26, 1998, Rite-Aid of Michigan (hereinafter referred to as "Rite-Aid") entered into a contract with Monarch Building Services, Inc. (hereinafter referred to as "Monarch") for the construction of a one story Rite-Aid pharmacy/shopping plaza at the southeast corner of Crooks and Maple Roads in the City of Troy. Rite-Aid did not have any personnel of any type on the project, it did not direct work on the project, nor did it offer any supervision of any type on the project. (Rite-Aid was eventually dismissed by stipulated order dated January 26, 2001.)

Monarch served as the general contractor for the construction project. Monarch, in turn, subcontracted to Capital Welding, Inc. (hereinafter referred to as "Capital") all the steel fabrication and steel erection work that was to be performed on this particular project. Capital, in turn, performed all the fabrication work but subcontracted the steel erection to Plaintiff Ralph Ormsby's employer, Abray Steel Erectors (hereinafter referred to as "Abray").

Abray employed Plaintiff Ralph Ormsby who was an experienced iron worker having been in the trade for approximately 15 years prior to the date of the accident. Ormsby was employed by Abray as a foreman beginning in August 1997. (16a, 22a)

On April 21, 1998, Capital had the structural steel delivered to the job site. Abray personnel unloaded the steel and began the process of erecting the steel. In order to do this, Abray utilized a crane and a crane operator (also an Abray employee). Due to some sort of scheduling conflict, Abray needed the crane off this job site by April 23, 1998. Apparently it had to be placed on a different site as of April 24, 1998.

Beginning with April 21, 1998, Abray personnel began to unload the steel and began the process of erecting the steel. The structural steel in the bay that was going to eventually collapse was erected on April 23, 1998. By virtue of the fact that the crane needed to get off the site, Abray personnel ordered the crane operator to load the bundles of decking onto the unsecured erected structural steel. (32a, 33a)

Accompanying the structural steel were warning tags which stated:

> "**WARNING** - All Joists, Bridging, and Joist Girders must be erected per the recommendations outlined in the Steel Joist Institute's Specifications; Delivery Tickets, and Erection Drawings.
>
> Joists are unstable during erection. **UNDER NO CIRCUMSTANCES ARE DECK BUNDLES OR CONSTRUCTION LOADS OF ANY OTHER DESCRIPTION TO BE PLACED ON UNABRIDGED JOISTS**. Any erector who allows this to be done is in **DIRECT VIOLATION** of **OSHA** regulations, creates significant risk of serious injury to person and property, and may be held liable for any injuries sustained."

(MIOSHA Report, p. B68, Appendix, 8a)

In spite of this warning which accompanied the steel, bundles of steel decking were placed on unsecured bar joists and beams by the Abray crew. Ormsby, an Abray foreman, was on the site on April 23, 1998, and was aware of the fact that bundles were on the joists and that the joists were unsecured. Irrespective of this knowledge, on April 24, 1998 he began working on the beams with the full knowledge that they were both unwelded as well as loaded. (Ormsby MIOSHA statement, 4a-7a)

There was a process used in order to get the unsecured joists in proper position. Ormsby would take a hammer, strike the joist and hope to straighten it into position

(44a-45a). While hitting an unsecured joist that held bundles of decking with his hammer, there apparently was a sudden shift in the unsecured joist. The sudden shift of the unsecured joist, coupled with the fact that it was loaded with decking, caused the collapse of the steel in the bay in which the Plaintiff was working resulting in his fall. The testimony was consistent to a man, that at no time did Abray personnel seek, need, or were given any work instruction from the general contractor or the general contractor's representative on the site, Scott Redding. The only trade working in this bay at the time of the accident were Abray iron workers.

Abray owner, Donald Abray, indicated that it was solely the decision of the erection foreman to place roof decking bundles and other supplies on unwelded bar joists (114a). He also indicated he had no contact with anyone from Monarch regarding the manner or method in which Abray erected the structure (114a). Finally, he acknowledged that they did not look to Monarch for instruction and did not expect Monarch to provide supervision, instruction or any specifics as to iron worker practices for Abray or its employees. Abray acknowledged his employees were primarily responsible for the same (116a, 114a).

In order to buttress their claim that this was a common work area, Plaintiff contends that there was one employee that he thought was doing some masonry work in an entirely different area of the job site whose trade and/or identity has never been determined.

C. Procedural History.

Defendant Monarch was named as a defendant for the first time in Plaintiffs' First Amended Complaint. Specifically, allegations made by Plaintiffs Ormsby against Monarch were that Monarch owed the Plaintiff a non-delegable duty by virtue of the fact that the

work was inherently dangerous, that Monarch had retained control of various aspects of this project and as such, breached the duty owed to the Plaintiff and was negligent in the hiring of assorted subcontractors.

Subsequent thereto, the Plaintiffs filed Second and Third Amended Complaints against Monarch. However, for the most part, the allegations remained the same.

On December 1, 2001, Monarch filed its Motion for Summary Disposition (152a-180a) and Plaintiffs filed a response to that motion on February 7, 2001. Also on February 7, 2001, Plaintiffs filed a Motion to Amend Complaint to file a Fourth Amended Complaint which alleged the theory of common work area against Monarch which had not been pled at any time previously.

The Oakland County Circuit Court held a hearing on March 7, 2001 at which point the Court denied Plaintiffs' Motion to Amend Complaint as being untimely and futile. The Court took the Motion for Summary Disposition filed by Monarch under advisement.

On March 16, 2001, the Trial Court granted Monarch's Motion for Summary Disposition relying on its Opinion and Order issued on September 19, 2000 relative to Defendant Capital's Motion for Summary Disposition (185a).

Since this Opinion and Order represented a final disposition of all claims as to all parties, the Plaintiffs filed a Claim of Appeal on March 26, 2001. Following the filing of Plaintiffs' Claim of Appeal, the parties briefed their respective positions and had oral argument before the Michigan Court of Appeals. On January 24, 2003, the Court of Appeals panel consisting of Justices Kelly, Jansen and Donofrio, issued an Opinion which reversed, in part, the holding of the Trial Court and affirmed, in part, the holding of the Trial Court (186a-200a).

On March 3, 2003, Monarch filed an Application for Leave to Appeal which was granted by this Court pursuant to an Order issued on November 6, 2003 (201a-202a).

INTRODUCTION

Upon review of this matter, the Michigan Court of Appeals conducted an in depth review of three doctrines that serve as exceptions to the general rule that a contractor ordinarily is not liable for the negligent acts of a subcontractor or its employees.

The Court of Appeals noted the "common work area" doctrine, the "retained control" doctrine, and the "inherently dangerous" doctrine as the three exceptions. The Court, after reviewing the genesis of the doctrines, proceeded as to Defendant-Appellant Monarch to affirm the grant of summary disposition by the Lower Court as to the "inherently dangerous" and "retained control" doctrines. It, however, proceeded to reverse the grant of summary disposition by the Lower Court as to the claim against Monarch that the injury did not occur in a common work area. In so doing, the Michigan Court of Appeals elected to ignore long standing case law that detailed what elements constituted a common work area.

The Oakland Circuit Court had previously found, based upon a review of all the evidence that was submitted by Plaintiff-Appellee Ormsby, that of the four elements necessary to demonstrate the existence and/or potential application of the "common work area" doctrine, two were not present. Specifically, the Oakland Circuit Court held that the unwelded structural steel with the improperly placed bundles of decking upon it, did not constitute a common work area. Second, the Oakland Circuit Court did not find that the fourth requisite element was present either, that being that the job "created a high degree of risk to a significant number of workmen." Irrespective of how the Lower Court may have found as to the other required elements, the absence of two of the required four elements

mandated the decision made by the Lower Court, that the common work area did not apply to this construction site.

The Court of Appeals found error in that the Lower Court did not address each of the elements applicable to the doctrine of common work area. Unfortunately, case law requires not just one, two or three elements to be present for the common work area exception to have application. It requires **all** the elements be present for the exception to apply. Therefore the Michigan Court of Appeals erred in reversing on this issue as to Monarch, and as to Capital Welding, which was merely a subcontractor on this project.

ARGUMENT

ISSUE I

THE "COMMON WORK AREA" DOCTRINE IS A DOCTRINE THAT HAS APPLICATION ONLY AS TO GENERAL CONTRACTORS, IN THE INSTANCES WHERE IT APPLIES.

A. Common Work Area and its Evolution.

Prior to the advent of *Funk v General Motors Corporation*, 392 Mich 91 (1974), the appellate courts in this state seemed to be in agreement with the general proposition that a general contractor (or land owner) could not be held liable for the negligent conduct of one of its subcontractors or a subcontractor's employee.

This Court's decision in *Funk, supra*, recognized the need to change that hard and fast rule of law to bring it more in line with public policy concerns and construction site reality, especially on some of the mega construction sites throughout the State of Michigan. The *Funk* Court noted that on large construction sites (*Funk* involved construction or a GM plant), it was highly unrealistic to allow job site safety to occur in a piecemeal fashion, *i.e.*, being left to each individual contractor. The Court opined that the entity best suited to both implement and coordinate job site safety was the general contractor. The Court in *Funk* observed and noted how many different trades wound up being exposed to similar risks, risks which for the safety of crews on the site required some sort of safety coordination. The Court stated as page 104 of the opinion:

> We regard it to be part of the business of a general contractor to assure that reasonable steps within its supervisory and coordinating authority are taken to guard against readily

> observable, avoidable dangers in common work areas which create a high degree of risk to a significant number of workmen.

In discussing its rationale for imposing liability against a general contractor under certain circumstances, the *Funk* Court stated the following at pages 109-110:

> The risks inherent in large-scale construction work justify imposing responsibility on a responsible person to take appropriate precautions. However, as the authority cited by the parties illustrate, it is difficult to generalize as to which party or entity should bear this responsibility.
>
> In some instances, as to some risk, it will appear unwarranted to impose the responsibility on anyone other than the immediate employer of the workmen, whether he be a subcontractor or general contractor. In other instances, as here, it will appear, by reason of additional factors, that the responsibility should be imposed on the general contractor. . .

The Court concluded at page 112 the following:

> We are satisfied, however, for the reasons already stated, that on the facts of this case it is an appropriate development of the law of torts to impose responsibility on a general contractor for the failure to implement safety measures in common work areas guarding against readily observable, avoidable serious risk of personal injuries. The basis of General Motors' liability, exercise of retained control, has long been established.

In rendering its decision in *Funk*, the Michigan Supreme Court, while creating an exception to the general rule of non-liability for general contractors, did **not** want the exception to have blanket application to all construction sites in all instances. The Supreme Court limited the exception of liability on the part of a general contractor to only those instances wherein **all** of the following were present:

(1) a contractor that had supervisory and coordinating authority;

(2) to guard against readily and observable dangers;

(3) in common work areas;

(4) which create a high degree of risk to significant number of workmen.

According to *Funk*, if all these elements were present, the "common work area" exception to the general rule would have application to a general contractor.

The *Funk* Court also created a second exception to the general rule of non-liability in making a determination that the property owner (in this case, General Motors) was liable as well. It did this on a separate and distinct basis of what has become to be known as the "retained control" doctrine.

In an appellate decision entitled *Erickson v Pure Oil Corporation*, 72 Mich App 330 (1976), the Court had an opportunity to apply the *Funk* doctrine. The Court recognized the limiting language utilized in *Funk* and stated the following at page 336 of its opinion:

> The frequently recurring use of the phrase 'common work area' in *Funk* suggests that the Supreme Court desired to limit the scope of a general contractor's supervisory duties and liabilities for injuries which occur in 'common work areas'.

Erickson recognized that the multiple contractors used to create a common work area did not have to be working in the location at the same time or at the same place. The factual scenario in *Erickson* was a situation where various trades at various times were working on a roof that had an oil film on it making the deck slippery for workmen who had complained but nothing was done to remedy the problem. In*Erickson* the Court concluded that although perhaps on a given day one trade may be on the roof, the roof constituted a common work area.

This Court had an opportunity to revisit the general proposition that an employer of an independent contractor was not liable for the contractor's negligence or the negligence of his employees once again in the case of *Bozak v Hutchinson*, 422 Mich 712 (1985). In so doing, the Court created a third exception to the rule and that exception dealt with the inherently dangerous activity doctrine.

The Court, in allowing liability to be imposed against a general contractor, predicated it to those instances where a risk or danger was cognizant in advance of the work, specifically at the time that the contract was entered into between the parties. It was not allowed to have application where new risks were created by virtue of the performance of the work which were not or could not have been contemplated at the time that the parties entered into the contract.

The Supreme Court had an opportunity to revisit common work area doctrine as well as the retained control doctrine in the case of *Plummer v Bechtel Construction*, 440 Mich 646 (1992). This involved an injury that took place during the construction of the Detroit Edison Bell River Power Plant. According to the case, at times this project involved as many as 2,500 workers from numerous trades, employed by a variety of contractors. The case addressed both issues of retained control and common work area.

The Court reaffirmed that a general contractor could only be liable for the negligent acts of a subcontractor in certain instances. It noted the components of one of those exceptions at page 666 of the opinion wherein it stated:

> In *Funk*, this Court held that a general contractor has the duty 'to assure that reasonable steps within its supervisory and coordinating authority are taken to guard against readily

> observable, avoidable dangers in common work areas which create a high degree of risk to a significant number of workmen.'

It maintained that limiting language in order to impose liability on a general contractor. In that particular case, there was an injury that took place from a catwalk which provided a wide assortment of trades with access to and from and on the construction project. The Court concluded that in fact this catwalk/platform was a common work area. The Court went on to discuss the rationale for the doctrine at page 667 when it said:

> The common work area formulation was an effort to distinguish between a situation where employees of a subcontractor were working in isolation from employees of other subcontractors and a situation where employees of a number of subcontractors were working in the same area.

The Court continued at page 668 by indicating the following:

> The common work area formulation sought to distinguish between a case where is appropriate to impose overall safety responsibility on the general contractor and one where it would not be appropriate.

The thrust being that in its reaffirmation of the exceptions in *Funk*, the Court recognized where there are a multitude of contractors or subcontractors in a given area, individual contractor responsibility will not afford a safe job site. In those situations, the general contractor, if the requisite criteria exists, is the one that must bear the burden of responsibility for safety.

Phillips v Mazda Motor Manufacturing, 204 Mich App 401 (1994) reaffirmed the exception to the general rule that a subcontractor can be liable for a subcontractor's negligence. It noted that the exception only applies when the general contractor failed to take reasonable precautions against "readily observable, avoidable dangers in common

work areas which create a high degree of risk to a significant number of workmen." The *Phillips* Court concluded that if other trades might be in an area, it could constitute a common work area.

It would appear that an example of what the *Phillips* Court is trying to say might be an instance such as; wherein ironworkers are typically required to place perimeter cable around the floor on a multi-level construction site. However, the ironworkers had failed to do so and another contractor was on the site leading to a fall by virtue of the fact that there was an absence of perimeter cable, this might well represent the thinking behind the *Phillips* Court pertaining to common work area not necessarily requiring subcontractors there at the same time.

The Michigan Supreme Court performed further refining on the *Funk* doctrine in *Groncki v Detroit Edison* , 453 Mich 644 (1996). It specifically enumerated the four elements that comprise the exception to the rule that a contractor cannot be liable for the negligent acts of a subcontractor. It stated at page 662:

> Thus, for there to be liability under *Funk* there must be: 1) a general contractor with supervisory and coordinating authority over the job site, 2) a common work area shared by employees of more than one subcontractor, and 3) a readily observable and avoidable danger in that common work area, 4) that creates a high degree of risk to a significant number of workers.

In *Groncki* the defense argued that the position taken by the Court of Appeals in *Phillips, supra* and *Erickson, supra,* unduly extended the application of *Funk*. The Court noted at page 663 that was not the case wherein it stated the following:

> The common work area, however, is only one element of *Funk*. The mere presence of a common work area, without supervisory control by the general contractor and a readily observable and avoidable risk to a significant number of workers, will not necessarily impose liability.

The Court went on to indicate that the holding in *Erickson* was merely a test for one of the potential four elements required to impose liability on a general contractor pursuant to the "common work area" exception.

The Michigan Court of Appeals had an opportunity to deal with the "common work area" doctrine in *Hughes v PMG Building*, 227 Mich App 1 (1997). The *Hughes* case was a little different because it appeared to apply in a residential housing development. The Court quoted from *Groncki, supra*, as to the four elements necessary for liability to be imposed against a general contractor on this theory. Interestingly, in the *Hughes* case, it is undisputed that more than one trade was involved or going to be involved in the construction of an overhang being built on one of the homes.

The Court seemed to take a more practical view of the application of the *Funk* "common work area" doctrine in comparing the claims being made in *Hughes* versus the situation that existed in *Funk*. It noted the following at page 7:

> Liability was imposed on the general contractor in *Funk* because Funk fell from a highly visible super structure that was part of the common work area, was within the control of the defendant, and posed a risk to thousands of other workers. In *Funk,* the Court employed a risk analysis, finding that liability should not be imputed unless the dangers in the work area involved 'a *high degree* of risk to a *significant number* of workers.' *Funk, supra* at 104 (emphasis added). See *Plummer v Bechtel* Construction Company, 440 Mich 646, 651; 49 NW2d 66 (1992) (the plaintiff fell from an interconnecting catwalk/platform system at a construction project involving 2,500 workers and a number of subcontractors); *Erickson,*

supra at 337 (the plaintiff fell from a roof used by numerous subcontractors when he slipped on oiled metal roof sheets).

The Court continued in distinguishing the instant situation even though there were multiple contractors involved from that of a *Funk* situation at page 8 of the opinion wherein it stated:

> If the top of the overhang or even the overhang in its entirety were considered to be a 'common work area' for purposes of subjecting the general contractor to liability for injuries incurred by employees of subcontractors, then virtually no place or object located on the construction premises could be considered not to be a common work area. We do not believe that this is the result the Supreme Court intended. This Court has previously suggested that the Court's use of the phrase 'common work area' in *Funk, supra,* suggests that the Court desired to limit the scope of a general contractor's supervisory duties and liability. See, e.g. *Erickson, supra* at 336. We thus read the common work area formulation as an effort to distinguish between a situation where employees of a subcontractor were working on a unique project in isolation from other workers and a situation where employees of a number of subcontractors were all subject to the same risk or hazard.

Thereafter the Michigan Court of Appeals addressed the case of *Candelaria v BC General Contractors, Inc*, 236 Mich App 67 (1999). In this case, the Court of Appeals seemed to blur the distinction between the "common work area" doctrine and the "retained control" doctrine. It noted that the latter doctrine only applied in situations where a common work area exists. A review of the cases relied upon in *Candelaria* do not seem to lend support to the assertion that the retained control doctrine applies only in common work areas. The import of such a finding would be to only make general contractors and/or property owners potentially liable in situations where a common work area is found to exist which simply does not coincide with the cases that deal with the "retained control" doctrine.

Those cases seem to consider the "retained control" doctrine (as will be address later in this brief) as a separate and distinct exception to the general rule of non-liability by a contractor for the negligence of a subcontractor.

B. *The Court of Appeals Erred in Reversing the Lower Court's Finding as to an Absence of the Common Work Area as to Monarch.*

The Michigan Court of Appeals proceeded to address all three recognized exceptions to the general rule of non-liability of a general contractor for the negligence of its subcontractor or its subcontractor's employees in its review of the instant matter in *Ormsby v Capital Welding*, 255 Mich App 165 (2003). While for the most part the analysis by the Michigan Court of Appeals is thorough and in this writer's opinion - correct, the application to the instant set of circumstances and the case at bar is flawed. Specifically, the Michigan Court of Appeals application of the "common work area" doctrine in the instant case, the Court of Appeals reversed the Lower Court's holding stating at page 187 of its opinion:

> Nonetheless, the Trial Court ruled, 'This Court finds there was no common work area that created a high degree risk to a significant number of workers' and, 'There is no evidence that other subcontractors would work on the erection of the steel structure.' The Trial Court did not address each of the factors in the common work area test. Although the Trial Court found there was no 'high degree of risk,' it did not first determine whether the evidence showed there was a readily observable and avoidable danger in the common work area.

The problem seems to be that in applying the rationale for the "common work area" exception to the facts at bar, the Court of Appeals ignored the four-prong test outlined in

Groncki, supra. In order for the "common work area" exception to have application there are four elements that must be established. They include (1) that there is a general contractor with supervisory and coordinating authority over the job site, (2) a common work area shared by employees of more than one subcontractor, and (3) a readily observable and avoidable danger in that common work area, (4) that creates a high degree of risk to a significant number of workers.

It is clear from the Lower Court's decision that they felt that element No. 2 of a common work area was not present and they found element No. 4 "a danger that created a high degree of risk to a significant number of workers" was also not present. Irrespective of whether the other two elements did or did not exist, Plaintiff-Appellee has the burden of proof to establish the presence of all four elements for the exception to have application. The Lower Court ruled as a matter of law that two of those four elements were not present and as such, Plaintiff-Appellee could not prevail on the common work area doctrine as against Monarch. It matters not whether two of the four elements are present, the failure of the Plaintiff to have all four requisite elements prevents him from defeating the grant of summary disposition to Monarch.

Therefore, while the discussion by the Michigan Court of Appeals relating to the "common work area" doctrine was thorough, the application leading to a reversal of the Lower Court's grant of summary disposition constituted error and warrants reinstatement of the original grant of summary disposition of the Trial Court.

ISSUE II

THE RETAINED CONTROL DOCTRINE IS A SEPARATE AND DISTINCT DOCTRINE FROM THE COMMON WORK AREA DOCTRINE

A. Origin and Evolution of Retained Control Doctrine.

The dichotomy between the doctrine of "common work area" and "retained control" was noted with this Court's decision in *Funk, supra*. Therein, the Court examined exceptions to the general rule of non-liability of land owners and general contractors for the negligence of subcontractors. In so doing, the Court felt that the "common work area" exception had application to the general contractor. At the same time it felt that a different doctrine, that of "retained control" served as the exception that was applicable to the property owner. From the initial pronouncement, this Court has viewed these as separate and distinct doctrines for the most part.

A look at the "retained control" doctrine notes that variations of it existed prior to the *Funk, supra* case. In the case of *Signs v Detroit Edison Company*, 93 Mich App 626 (1979), the Court acknowledged the existence of the general rule insulating a contractor from liability to the employee of an independent contractor. It was examined in a context outside of that of the "common work area" exception. The Court of Appeals looked for guidance to its prior holding in *Misiulis v Millbrand Maintenance Group*, 52 Mich App 494 (1974). *Misiulis* was a pre-*Funk* decision that examined liability for actions of an independent contractor. It noted in quoting from *Restatement of Torts* the following at pages 499-500 of the opinion:

Thus, the most arguably pertinent *exclusion* from the general rule of non-liability is codified in *2 Restatement Torts,* 2d, § 414, p 387, which states:

> 'One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.'

The *Misiulis* Court continued at page 500, quoting from Comment C of the *2d Restatement of Torts,* § 414, by noting the following:

> In light of this fact, Comment C to § 414 is relevant:
>
> > 'It is not enough [to impose liability under this section] that he [the contractee] has merely a general right to order the work stop or resume, *to inspect its progress* or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be retention of a right to supervision that the contractor is not entirely free to do the work in his own way.' (Emphasis added.)

Therefore it appears, irrespective of the context, retained control has been a viable doctrine prior to *Funk*, but perhaps not as widely applied to a land owner/general contractor situation on a construction site until *Funk.*

Any number of cases have looked at the doctrine of retained control and added building blocks to the application of the doctrine. In *Miller v Great Lakes Steel*, 112 Mich App 122 (1982) the Court discussed retained control as it applied to the owner of a

construction project. In that, the Court felt in citing *Erickson, supra,* that a contractual right to terminate anyone who did not comply with owner's rules and regulations was not sufficient to constitute the requisite control necessary for the implementation of liability pursuant to the retained control exception.

By the same token, in *Moody v Pulte Homes, Inc.*, 423 Mich 150 (1985), the Court in that particular case was persuaded by the fact that the general contractor against whom the exception was sought to be applied did not retain the right to control the personnel or the equipment brought on to the job site. The plaintiff sought to impose liability against Pulte Homes based upon contractual provisions alone which the Court recognized was insufficient to trigger the retained control exception.

Once again, when a plaintiff sought to impose liability against an owner in *Wolfe v Detroit Edison*, 156 Mich App 626 (1986), the Court felt that a contractual right to terminate a contractor who did not comply with contract specifications was insufficient as a matter of law to constitute actual control of the work. The Court noted that the owner needed to retain the right to partially control and direct actual construction on the project in order to fall within the retained control exception for the imposition of liability.

The retained control exception was modified in the case of *Muscat v Khalil*, 150 Mich App 114 (1986). Therein the Court acknowledged that retained control is applicable to an owner if there is not a true delegation of the work or if he does retain control of the work. It also went on to note that it may have application if the owner is faced with a non-delegable duty. See also *Samhoun v Greenfield Company*, 163 Mich App 34 (1987).

The retained control doctrine underwent further refinement when examined by the Court of Appeals in the case of *Samodai v Chrysler Corporation*, 178 Mich App 252 (1989). In *Samodai*, the Court indicated that typically the employer of a worker is immediately responsible for job safety and for maintaining a safe work environment for his employee. However, it went on to note the exceptions to that rule noting that an owner of property could be liable if there is a retention of control or if the work is inherently dangerous. The Court distinguished the types of situations where the doctrine may have application versus where it may not. It stated at page 256:

> However, contractual provisions subjecting the contractor to the contractee's oversight are not enough to retain effective control. *Erickson v Pure Oil Corp.*, 72 Mich App 330, 339; 249 NW2d 411 (1976). The requisite nature of this standard requires that the owner retain at least partial control and direction of actual construction work, which is not equivalent to safety inspections and general oversight. *Miller v Great Lakes Steel Corp.*, 112 Mich App 122; 315 NW2d 558 (1982); *Wolfe, supra.*

This Court also provided insight into the requisite control necessary for the retained control doctrine to apply in *Plummer, supra.* In relying on the *Restatement of Torts 2d*, the Court agreed that a general right to order work stopped, progress inspections, receipt of reports, to make recommendations or suggestions which do not have to be followed are all indicia which would **not** be deemed to reflect a retention of control by the general contractor.

In *Reeves v Kmart Corporation*, 229 Mich App 466 (1998), the Court examined the retained control issue and what exceptions apply to the imposition of liability for the acts of an independent contractor. The Court again noted that there were two exceptions - the

retention of control doctrine and the inherently dangerous doctrine. The Court went on to note that although *Funk, supra* had addressed the issue pertaining to a property owner and/or a general contractor, that they did not believe that the Supreme Court intended that the rule be limited to that type of a factual situation. This seems to lend additional credence to the fact that the "retained control" doctrine is a separate and distinct doctrine from the "common work area" doctrine.

In *Candelaria v BC General Contractors, Inc, supra*, the Michigan Court of Appeals, although blurring the distinction between the "common work area" doctrine and the "retained control" doctrine, provided a good summary/example of cases and the significant nature of control that is required for the retained control doctrine to apply. It stated as page 75 the following:

> See *Phillips v Mazda Motor Manufacturing (USA) Corp.*, 204 Mich App 401, 408; 516 NW2d 502 (1994) ('there must be a high degree of actual control; general oversight or monitoring is insufficient.'); *Burger v Midland Co-Generation Venture*, 202 Mich App 310, 317; 507 NW2d 827 (1993) ('[T]he owner must retain at least partial control and direction of the construction work, beyond safety inspection and general oversight.'); *Samodai, supra* at 256 ('The requisite nature of this standard requires that the owner retain at least partial control and direction of *actual* construction work, which is not equivalent to safety inspections and general oversight.'); *Miller v Great Lakes Steel Corp.*, 112 Mich App 122, 127; 315 NW2d 558 (1982) ('Some sort of substantive control must be maintained by the owner over the contractor's work in order to render the owner liable for an injury to a contractor's employee.'); *Erickson, supra* at 339 ('Holding that an owner's mere retention of the *contractual right* to terminate employment of those not in compliance with its rules and regulations was not sufficient.')

After reviewing this, the *Candelaria* Court went on to say at page 76:

> At a minimum, for an owner or general contractor to be held directly liable in negligence, its retention of control must have had some *actual affect* on the manner or environment in which the work was performed.

The Court of Appeals in *Ormsby, supra* examined the role of Monarch as the general contractor to see if in fact plaintiff had established that Monarch had exercised a "high degree of actual control" or an "actual effect" on the construction so as to trigger the exception to the general rule of non-liability. The Court recognized in this instance that the mere contractual right to control absent the actual control or direction of the construction work itself did not constitute the type of control necessary for Monarch to be found liable to the Plaintiff. As a result, relative to the issue of retained control as applicable to Monarch, this Court should affirm the actions of the Michigan Court of Appeals.

B. *The Interrelationship Between the Retained Control and Common Work Area Doctrines.*

The doctrine of retained control and the doctrine of common work area have differing origins, and although they appear together on numerous occasions, they should not be considered conjoined doctrines. Each may operate separately and distinctly from the other.

Retained control has its origins in Master/Servant legal theory. In contrast, common work area, in this jurisdiction, has its origin from this Court's decision in the *Funk* case, *supra*.

The elements of each theory are separate and distinct from one another, and it is not incumbent that both theories exist in the presence of each other.

As noted in outlining what constitutes the basis for imposition of common work area liability in *Plummer, supra*, this Court detailed four elements, none of which really dealt with actual control. By the same token, the key element necessary for the retained control doctrine to apply is actual control impacting the actions of a subcontractor or independent contractor.

When examining the scope of the common work area doctrine, it is important that this Court take a step back and review the circumstances that led to its landmark opinion in the *Funk* case. The *Funk* case involved a large construction project, numerous subcontractors, numerous trades and workmen. It would only be logical, in adopting the rationale of the Michigan Supreme Court, that a general contractor, if the exception is applicable, could be the only entity to which the common work area doctrine could have application. To have the common work area doctrine apply to subcontractors would create the precise type of piecemeal job safety on large construction projects that led this Court to adopt the common work doctrine as an exception in *Funk* in the first place.

By the same token, retained control is a wholly separate and distinct doctrine. It operates outside the purview of a common work area. Based upon case law, it seems to have application in any circumstance where an entity is exercising "actual control" over the actions or activities of another contractor. The doctrine operates irrespective of whether the entity is a landowner, general contractor, or subcontractor. The key to its operation does not appear to be how the party is designated, but whether the party is exercising actual control over the work of another entity. If a party is exercising actual control over another entity, then it would appear that the retained control doctrine does have application and whether or not this occurs in a common work area or in some other forum is irrelevant.

As a result, there often are instances that bring the two doctrines together, particularly in the construction site situation. However, the doctrines are not the same, and are not dependent upon one another for purposes of having application in a given circumstance. Each affords a separate and distinct basis for a claim by an individual as long as the appropriate requisites are met.

RELIEF REQUESTED

In conclusion, the Court of Appeals specifically, with respect to the actions taken in Section IV entitled "Analysis", subsection B entitled "Common Work Area", needs to be reversed. The Court erred in applying the common work area doctrine to Monarch inasmuch as the Court failed to adhere to established precedence pertaining to the elements of the common work area doctrine.

When the elements of common work area doctrine are examined, it is clear that at a minimum two of those elements were never present in the instant case, which precludes the application of the doctrine, according to existing case law, as against Monarch. This action warrants reversal of Section IV, B as it pertains to Monarch.

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DATED: January 5, 2004